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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK AARON MORENO,

Defendant and Appellant.

G051550

(Super. Ct. No. 05NF4135)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed.

Paul J. Katz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Anthony DaSilva and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

Frank Aaron Moreno appeals from the denial of his petition for relief under Proposition 47, The Safe Neighborhoods and Schools Act (Proposition 47), which sought to reduce a felony conviction for taking or driving a vehicle (Veh. Code, § 10851). We affirm.

FACTS

Moreno was charged with one count of unlawfully taking or driving a 1984 Buick Regal with a prior conviction for the same crime in 2001 (Veh. Code, § 10851, subd. (a); Pen. Code, § 666.5, subd. (a); all further statutory references are to the Penal Code unless otherwise stated) and possession of burglary tools (§ 466). The information alleged Moreno had one strike prior (§ 667, subds. (a)-(i)) and he had served a prior prison term (§ 667.5, subd. (b)).

On May 24, Moreno pleaded guilty to both crimes and admitted the prior strike and prison term enhancement allegations. The factual basis for the plea was as follows: “October 26, 2005, as an accomplice, I aided and abetted another in unlawfully driving and taking a motor vehicle, not my own, without the consent of the owner, and with intent to temporarily deprive the owner to possession of the vehicle.” The court imposed a four-year prison term.

On January 29, 2015, Moreno filed an application to reduce the felony vehicle theft conviction to a misdemeanor pursuant to section 1170.18, subdivision (f), one of the statutes enacted as part of Proposition 47. The court denied the application and Moreno appealed.

DISCUSSION

Proposition 47 amended various provisions of the Penal and Health and Safety Codes to reduce specified drug and theft offenses to misdemeanors unless the crime is committed by an ineligible defendant. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) Vehicle Code section 10851 is not one of the specified theft offenses covered by Proposition 47.

Moreno concedes the point but asserts the new petty theft statute added by Proposition 47 (§ 490.2)¹ should be read broadly to include the theft of vehicles with a value less than \$950. That is because section 1170.18 subdivision (a) provides relief when the defendant “would have been guilty of misdemeanor under the act that added this section had this act been in effect at the time of the offense Moreno also argues grand theft of a vehicle (§ 487) may be reduced pursuant to section 1170.18, and constitutional principles of equal protection prohibit disparate treatment of Vehicle Code section 10851 convictions.

The issue of whether or how Proposition 47 applies to Vehicle Code section 10851 convictions is currently pending before the California Supreme Court in *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793 (Veh. Code, § 10851 ineligible for resentencing under § 1170.18, subd. (a)); *People v. Haywood* (2015) 243 Cal.App.4th 515, review granted March 9, 2016, S232250 (same); *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted March 16, 2016, S232344 (Veh. Code, § 10851 eligible for reduction provided offense meets definition of petty theft); *People v. Solis* (2016) 245 Cal.App.4th 1099, review granted June 8, 2016, S234150 (plain meaning of § 490.2 excludes Veh. Code, § 10851 offenses from Proposition 47 relief), and *People v. Johnston* (2016) 247 Cal.App.4th 252, review granted July 13, 2016, S235041 (same).

However, we need not address these issues in the present case. One settled issue in Proposition 47 litigation is who bears the burden of proving eligibility under section 1170.18. The defendant must establish his or her eligibility for relief. (*People v. Sherow*

¹ Section 490.2, subdivision (a) states, “Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor”

(2015) 239 Cal.App.4th 875, 880.) But Moreno failed to present any evidence the 1984 Buick Regal he took or drove without the owner's permission in 2006 had a value of \$950 or less. Consequently, his application was properly denied, even assuming Vehicle Code section 10851 convictions are subject to reduction through section 490.2.

DISPOSITION

The judgment is affirmed. However, nothing in this opinion shall foreclose Moreno's ability to file a new Proposition 47 petition alleging sufficient facts to support his claim for relief.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.